

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Home Affairs

Coronavirus Economic Response Package Omnibus Act 2020

Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020

Legislative Authority

This determination is made under subitem 1(2) of Schedule 16 to the *Coronavirus Economic Response Package Omnibus Act 2020* (the Act).

Schedule 16 to the Act grants the relevant Minister the power to determine a new sunset day for Acts or legislative instruments that are due to sunset on or before 15 October 2020, regardless of the way they are described to sunset. This includes where an Act or part of an Act is automatically repealed by way of an express provision.

Paragraph 1(2)(a) of the Act provides that the revised sunset date must be no later than six (6) months from the original sunset day of the sunseting legislation.

Purpose of this determination

This determination defers the enacted sunset of Division 3 of Part III (Special powers relating to terrorism offences) of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). Section 34ZZ of the ASIO Act provides that Division 3 of Part III ceases to have effect on 7 September 2020 (the original sunset day).

This determination ensures that the current Division 3 of Part III of the ASIO Act continues to operate until 7 March 2021. This is no longer than six (6) months after the original sunset day.

Division 3 of Part III of the ASIO Act sets out a framework that allows the Australian Security Intelligence Organisation (ASIO) to question and detain persons under a warrant in relation to terrorism offences. The continual operation of these powers is of vital importance to the counter-terrorism efforts of ASIO. The determination extends the framework for a further six (6) months to ensure that ASIO will continue to have operational powers to respond to the ongoing threat of terrorist activities in Australia.

Division 3 of Part III was originally inserted into the ASIO Act through the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*. Section 34ZZ of the ASIO Act has subsequently been amended on occasion to extend the sunset date.

Most recently, the *Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Act 2019* amended section 34ZZ of the ASIO Act by providing that the sunset date be extended from 7 September 2019 to 7 September 2020.

The Australian Security Intelligence Organisation Amendment Bill 2020 was introduced into Parliament on 13 May 2020. This Bill would repeal ASIO's current detention powers, as set out in Division 3 of Part III of the ASIO Act, and introduce a new questioning warrant framework. The Bill also contains amendments to the surveillance device framework in the ASIO Act to allow ASIO to internally authorise the use of tracking devices in certain circumstances, other than under a warrant.

The Bill's introduction was delayed due to changes to the Parliamentary schedule resulting from the COVID-19 pandemic. This also resulted in a delay to the Parliamentary Joint Committee on Intelligence and Security's review of the Bill, and will result in consequential delays in making any amendments to the Bill that may be appropriate to introduce in response to the Committee's recommendations.

This determination safeguards against the current laws on questioning, as well as questioning and detention powers, from inadvertently sunseting while Parliament considers the provisions in the Bill, and instead ensures they continue until 7 March 2021, or until the provisions in the Bill are operative (if earlier).

This determination is a legislative instrument for the purposes of the *Legislation Act 2003*, and is disallowable under section 42 of that Act.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that this instrument is compatible with human rights. A copy of the Statement is provided at Attachment A.

Relevant Minister

The Minister for Home Affairs is the "relevant Minister" for the purposes of subitem 1(5) of Schedule 16 to the *Coronavirus Economic Response Package Omnibus Act 2020*.

The Minister for Home Affairs administers the ASIO Act under the current Administrative Arrangements Order.

Regulatory Impact Analysis

The determination contains measures that are minor or machinery in nature. The Office of Best Practice Regulation (**OBPR**) has advised that the deferral of sunseting made by this instrument under Schedule 16 to the *Coronavirus Economic Response Package Omnibus Act 2020* has minor regulatory impact. A regulation impact statement (RIS) is not required.

The OBPR Reference number is 26461.

Privacy Implications

The ASIO Act, including provisions within Division 3 of Part III, provides a framework for the protection of an individual's personal information and how personal information is collected, disclosed or used for the purposes of the ASIO Act. Importantly, ASIO has stringent policy and operational safeguards for the appropriate use of the Organisation's powers in relation to the collection, use and lawful disclosure of information. The effect of this determination does not alter the existing privacy framework in the ASIO Act, and does not change or amend any existing powers. The determination only extends the sunset day of Division 3 of Part III of the ASIO Act for six (6) months from the current sunset day.

Consultation

The Administrative Law Section in the Attorney-General's Department, the Office of Parliamentary Counsel and the Department of the Prime Minister and Cabinet were consulted in the preparation of this determination.

Details of the Instrument

The Instrument provides that, under subitem 1(2) of Schedule 16 to the Act, the Honourable Peter Dutton, Minister for Home Affairs, determines that:

- (a) Division 3 of Part III of the ASIO Act continues to operate until 7 March 2021; and
- (b) it ceases to operate on 7 March 2021.

The Instrument has the effect of deferring the 7 September 2020 sunset day provided in section 34ZZ of the ASIO Act until 7 March 2021.

The instrument will commence on the day after it is registered.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Coronavirus Economic Response Package (Deferral of Sunsetting—ASIO Special Powers Relating to Terrorism Offences) Determination 2020/135

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

For the purposes of subitem 1(2) of Schedule 16 to the *Coronavirus Economic Response Package Omnibus Act 2020* (the Act), this determination is made to extend the operation of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) beyond its current sunsetting date of 7 September 2020 (section 34ZZ of the ASIO Act refers).

The effect of this determination is that Division 3 of Part III of the ASIO Act continues to operate until 7 March 2021.

Division 3 of Part III of the ASIO Act sets out a framework of special powers to question and detain persons to obtain intelligence in relation to terrorism offences. The continued operation of these powers is of vital importance to the counter-terrorism efforts of ASIO. The making of the determination will ensure that ASIO will continue to have operational powers to respond to the ongoing threat of terrorist activities in Australia.

Human Rights Implications

This determination engages the following human rights:

- the right to freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and Articles 2 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and right to humane treatment in detention in Article 10 of the ICCPR
- the right to freedom from arbitrary detention and arrest, and the right to liberty and security of the person in Article 9 of the ICCPR
- the right to freedom of movement in Article 12 of the ICCPR
- the right to protection against arbitrary and unlawful interferences with one's privacy or home in Article 17 of the ICCPR
- the right to freedom of expression in Article 19 of the ICCPR
- the right to freedom of association in Article 22 of the ICCPR, and
- the right of the child to have their best interests as a primary consideration by courts of law, administrative authorities or legislative bodies in Article 3 of the *Convention on the Rights of the Child* (CRC).

Freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and Articles 2 and 16 of the CAT and right to humane treatment in detention in Article 10 of the ICCPR

Article 7 of the ICCPR and Articles 2 and 16 of the CAT provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 10 of the ICCPR provides that all people who are deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person. This determination engages humane treatment obligations under Article 10, by extending the operation of ASIO's existing questioning and detention powers under Division 3 of Part III of the ASIO Act. A person who is the subject of a warrant issued under Division 3 may be deprived of their liberty for the duration of their custody or detention under that warrant.

Division 3 provides for an extensive range of safeguards to ensure the humane treatment of people who are subject to warrants issued under that Division. This includes an express obligation on people exercising authority under a warrant (or implementing or enforcing a direction given by a prescribed authority) to treat the subject with humanity and respect for human dignity, and a prohibition on subjecting them to cruel, inhuman or degrading treatment (section 34T). Criminal offences, carrying maximum penalties of two years' imprisonment also apply to people who knowingly contravene safeguards, including directions given by prescribed authorities.

In addition, the Statement of Procedures issued under section 34C sets out a number of requirements in relation to the humane treatment of people subject to questioning and questioning and detention warrants. These include requirements to ensure the health and welfare of people while in detention or custody (including while being transported), to ensure that the manner of questioning is humane and courteous, and that people are offered appropriate breaks in questioning (30 minute breaks after every four hours of continuous questioning).

A person who is the subject of a warrant is permitted to contact the Inspector-General of Intelligence and Security (IGIS) or the Ombudsman, and has the opportunity to make complaints about his or her treatment.

Freedom from arbitrary detention and arrest, and the right to liberty and security of the person in Article 9 of the ICCPR

Article 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.

Article 9 regulates, rather than prohibits, detention. Only detention that is 'arbitrary' is prohibited. The United Nations Human Rights Committee has stated that 'arbitrariness' includes the elements of inappropriateness, injustice and a lack of predictability. Arrest or detention must be reasonable and necessary in all circumstances with reference to the

recurrence of crime, interference with evidence or the prevention of flight. Detention is not considered arbitrary where it is reasonable, necessary and proportionate to achieving a legitimate objective. The legitimate objective of the questioning warrant regime is to protect Australia's national security interests, in particular, by preventing terrorist acts.

The power to detain a person under ASIO's questioning and detention warrant provisions is justified to ensure that ASIO can collect intelligence that is important in relation to a terrorism offence, in circumstances where:

- there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence
- relying on other intelligence collection methods would be ineffective; and
- there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person may:
 - alert a person involved in a terrorism offence that the offence is being investigated
 - fail to appear before the prescribed authority; or
 - destroy, damage or alter a record or thing the person may be requested to produce under the warrant.

An issuing authority (a federal court judge) may then issue a warrant if satisfied there are reasonable grounds for believing that questioning the person who is the subject of a warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence.

Division 3 remains consistent with Article 9 as it is reasonable, necessary and proportionate to achieving the legitimate objective of maintaining national security.

Freedom of movement in Article 12 of the ICCPR

Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. A questioning warrant restricts this right to the extent that the issuing of such a warrant requires a specified person to appear before a prescribed authority for questioning immediately after the person is notified of the issue of the warrant or at a time specified by the warrant.

This limitation on a person's right to freedom of movement achieves the legitimate objective of protecting Australia's national security interests, specifically, the prevention of terrorist acts. The legitimate objective is reflected in the legislative threshold for issuing a warrant, that requires the Attorney-General must be satisfied that the warrant will 'substantially assist in the collection of intelligence that is important in relation to a terrorism offence' (paragraph 34E(1)(b)) in consenting to a request for the issue of a warrant.

The limitation on the right to freedom of movement is reasonable, necessary and proportionate. This is based on the safeguards already built into the questioning warrant framework.

The Guidelines issued to the Director-General of ASIO under subsections 8A(1) and 8A(2) of the ASIO Act provide a safeguard for the appropriate use of ASIO's powers, including its Division 3 powers. The *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)* (the ASIO Guidelines) require ASIO to consider the intrusiveness and proportionality of its avenues for obtaining information:

- any method for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence
- inquiries and investigations should be undertaken using as little intrusion into a person's privacy as is possible; and
- wherever possible the least intrusive techniques of information gathering should be used before resort to the more intrusive techniques (where a threat is assessed as likely to develop quickly, a greater degree of intrusion may be justified).

To the extent that questioning warrants restrict the right to freedom of movement, the restriction is reasonable, necessary and proportionate to achieving the legitimate objective of gathering important intelligence in relation to terrorism offences.

Right to protection against arbitrary and unlawful interferences with one's privacy or home in Article 17 of the ICCPR

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy or home. The use of the term 'arbitrary' means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee interpreted 'reasonableness' to imply that any limitation must be proportionate and necessary in the circumstances.

Section 34U provides a police officer with a limited power to enter a dwelling in order to take a subject into custody under a questioning and detention warrant, or where a subject has failed to appear before the prescribed authority for questioning, only where the police officer believes on reasonable grounds that the subject is at the premises. In circumstances where a person has failed to appear, a police officer must not enter the dwelling between the hours of 9pm and 6am unless the police officer believes on reasonable grounds that it would not be practicable to take the person into custody at another dwelling or time.

This power is necessary and proportionate to achieve the legitimate objective of ensuring a subject does not alert a person involved in a terrorism offence that the offence is being investigated, fail to appear before the prescribed authority, or destroy, damage or alter a

record or thing the person may be requested to produce under the warrant. The legitimate objective aims to protect the community by preventing the commission of a terrorist attack. The imminence of a terrorist threat requires ASIO to be able to respond quickly to ensure the preservation of information that may be important in relation to a terrorism offence.

A questioning warrant or a questioning and detention warrant compels subjects to provide information which would otherwise be private. These powers are reasonable and proportionate measures which are necessary to ensure the gathering of information which is important in relation to a terrorism offence.

There are a number of safeguards which protect an individual's private information. In carrying out questioning, ASIO is bound by the ASIO Guidelines, which relevantly provide that information must be obtained by ASIO using as little intrusion into individual privacy as possible, consistent with the performance of ASIO's functions. ASIO's functions dictate that the organisation must only collect information which is relevant to security, meaning that ASIO will be precluded from collecting personal information which is not connected to a national security issue. The ASIO Guidelines also provide that the means used for obtaining information must be proportionate to the gravity of the threat and the probability of its occurrence.

If private information is obtained, specific safeguards exist which prevent it from being unlawfully disclosed. Under section 34ZL, if the Director-General is satisfied that private information obtained under a warrant is not required for the purposes of ASIO's functions, ASIO must cause any record or copy of this information to be destroyed.

The IGIS may be present at the questioning of an individual and it remains open to the IGIS to raise any concern about the impropriety or illegality of any exercise of the powers under Division 3. If such a concern is raised, the prescribed authority may give a direction to suspend questioning under the warrant.

Right to freedom of expression in Article 19 of the ICCPR

Article 19 of the ICCPR provides that everyone has the right to freedom of expression, including the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media. This determination engages this right by extending the operation of ASIO's existing compulsory questioning powers, which include specific secrecy provisions and limit the ability of the subject of a questioning warrant to contact family members or legal representatives. Article 19 also provides that the right to freedom of expression may be limited on grounds of national security, provided that any limitation has been prescribed by legislation and is reasonable, necessary and proportionate to achieve the desired purpose.

Division 3 contains secrecy provisions which engage the right to freedom of expression by restricting the disclosure of information. These secrecy provisions are necessary to ensure the effectiveness of intelligence gathering operations which are conducted in relation to terrorist

offences. While a warrant is in force, subsection 34ZS(1) prevents the disclosure of information that could have significant implications for the integrity of the questioning process under the warrant and the effectiveness of related investigations. The additional protections provided under subsection 34ZS(2) operate to protect ASIO's sources, holdings of intelligence and its method of operations, as the release of this information could seriously affect ongoing and related investigations which can be long-running.

These secrecy provisions contain a number of safeguards to ensure they function in a reasonable and proportionate manner. Persons who are subject to a warrant may disclose information which would ordinarily be subject to secrecy provisions if authorised to do so by the Director-General or the Attorney-General. A person may also disclose information to a lawyer for the purpose of seeking legal advice, to a court for the purpose of seeking a remedy in connection to a warrant, or to the IGIS or the Commonwealth Ombudsman in relation to a warrant under Division 3. These permitted disclosures ensure that the rights of the subject of a warrant are maintained while appropriately protecting sensitive information.

Right to freedom of association in Article 22 of the ICCPR

Article 22 of the ICCPR protects the right of all persons to group together voluntarily for a common goal and to form and join an organisation. Article 22(2) provides that this right may be limited for the purpose of national security.

As established above, Division 3 contains a number of safeguards to ensure that any limitation on the right to freedom of association is reasonably adapted, necessary and proportionate.

Under a questioning and detention warrant, the subject of the warrant is limited in their ability to freely associate with others for the duration of questioning or detention. The limitation on the right to freedom of association achieves the legitimate objective of protecting Australia's national security interests, in particular, preventing terrorist acts. This is inherent in the requirement for issuing a questioning warrant.

In consenting to a request for the issuing of a warrant, the Attorney-General must be satisfied that the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence. The Attorney-General may only consent to a request for a warrant if he or she is satisfied that relying on other methods of collecting that intelligence would be ineffective and there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person may alert others involved in a terrorism offence that the offence is being investigated.

By ensuring that the Attorney-General is satisfied of these requirements, the framework ensures that any limitation on the right to the freedom of association is appropriate to the threat and necessity of the situation. The right is only limited for the duration of detention, and only when the above criteria have been satisfied. During detention a person retains the rights previously stated (such as the ability to make a complaint or contact the IGIS). Any

contravention of these safeguards may constitute an offence under section 34ZF, which is punishable by imprisonment for two years.

Right of the child to have their best interests as a primary consideration by courts of law, administrative authorities or legislative bodies in Article 3 of the Convention on the Rights of the Child (CRC)

Australia's obligations with respect to children arise principally under the Convention on the Rights of the Child. Article 3 of the CRC requires that the best interests of the child shall be a primary consideration in all actions concerning social welfare institutions, courts of law, administrative authorities or legislative bodies.

The ability to detain a person who is 16 or 17 years under a questioning and detention warrant engages the rights under Article 37(b), specifically, the prohibition on the arbitrary detention of children, and the requirement that detention only occur as a measure of last resort and for the shortest appropriate period of time. Humane treatment obligations in Article 37(c) are also engaged. The ability to detain a young person under a questioning warrant further engages the right to legal assistance and a right to challenge that detention under Article 37(d).

There may be a legitimate need to issue a warrant in relation to a child – namely, where that person will commit, is committing, or has committed, a terrorism offence. The exclusion of people under the age of 18 years from questioning and detention warrants would leave a significant gap in ASIO's ability to collect crucial intelligence on real terrorism threats.

Significant safeguards apply in relation to the questioning and detention of people who are 16 or 17 years of age, ensuring that detention is not arbitrary, is a measure of last resort, and adheres to the specific humane treatment obligations in relation to children in detention.

The additional requirements in subsection 34ZE(4) apply to questioning and detention warrants issued in relation to people who are 16 or 17 years of age. That is, the Attorney-General must be satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence, and the warrant will meet all of the special requirements for young people in subsection (6) of section 34ZE.

Further requirements in subsection 34ZE(6) (permission to contact a parent, guardian or other appropriate person) and subsection 34ZC(1)(f) (any search to happen in the presence of a parent, guardian to other appropriate person) apply to questioning and detention warrants issued in relation to people who are 16 or 17 years of age.

In addition, people who are 16 or 17 years of age who are subject to a questioning warrant or a questioning and detention warrant have the same rights as people 18 years and over to access a lawyer, to seek a judicial remedy in relation to their detention, make a complaint to the IGIS or the Ombudsman, and to be informed by the prescribed authority of their rights.

Conclusion

While this determination engages a range of human rights, it is compatible with these rights to the extent that any limitation on these rights is reasonable, necessary and proportionate to achieving a legitimate objective. ASIO's questioning and detention powers set out in Division 3 of Part III of the ASIO Act support the legitimate objective of countering serious threats to Australia's national security interests, in particular, the prevention of terrorist acts.

Extending the operation of these powers ensures Australia's counter-terrorism capabilities are maintained while legislation to reform the powers following the Parliamentary Joint Committee on Intelligence and Security's report on the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (PJCIS report) are progressed through Parliament.